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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

JOANNA GARCIA, an individual, KATHERINE VANESSA GARCIA, an individual, and THE ESTATE OF ENRIQUE GARCIA SANCHEZ,

Plaintiffs,

v.

ESSAM R. QURAISHI, M.D., and DOES 1 through 50 inclusive,

Defendants.

Case No. 30-2019-01060953

Hon. James Crandall
Dept. C33

DEFENDANT ESSAM R. QURAISHI, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL

[Evidentiary Objections and Declarations of Robert L. McKenna III and Esther W. Kim filed concurrently]

Related/Opposition to ROA#572

Date: August 4, 2022
Time: 10:00 a.m.
Dept.: C33

Action filed: March 29, 2019

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INTRODUCTION

The parties in this medical malpractice action presented their respective cases at trial. The jury found by unanimous verdict that defendant Essam R. Quraishi, M.D. was not negligent in the medical care and treatment of plaintiffs' decedent, Enrique Garcia Sanchez. Plaintiffs' over-length motion presents a variety of grounds on which they assert a new trial should be granted. None is meritorious. The motion should be denied.[1]

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs Pursued This Action Against Dr. Quraishi And Other Defendants Alleging Wrongful Death And A Survivor Claim

Plaintiffs, Johanna Garcia, Katherine Vanessa Garcia, and the Estate of Enrique Sanchez, filed their Complaint in this action on March 29, 2019. The operative pleading alleged a cause of action for wrongful death by plaintiffs Johanna Garcia and Katherine Vanessa Garcia and survival action by the Estate of Enrique Garcia Sanchez.

Plaintiffs alleged that Mr. Sanchez was admitted to South Coast Global Medical Center's Intensive Care Unit on November 5, 2017, for acute abdominal pain, pancreatitis, acute hypokalemia and alcohol abuse. (First Amended Complaint ("FAC"), at ¶ 10.) While admitted, a percutaneous endoscopic gastrostomy (PEG) tube was placed by Dr. Quraishi and an order for tube feeding was given by Viney Soni, M.D., on December 5, 2017. (Declaration of Esther W. Kim ("Kim Decl.") Exh. 2, pp. 54:24-25 [Reporter's Transcript ("RT"), 3/28/22].)[2] Plaintiffs claimed Mr. Garcia's condition deteriorated despite aggressive care. He was transferred to Kindred Hospital and then to UC Irvine Medical Center where he died on December 31, 2017. (FAC ¶¶ 20-21.)

Plaintiffs pursued their action against several defendants, including South Coast Global Medical Center; Dr. Soni (a pulmonologist); Raj Menon, M.D. (family medicine); Davinder Singh, M.D. (a gastroenterologist); and Dr. Quraishi. They did not sue

[1] Defendant objects to plaintiffs' over-length brief. (See CRC, rule 3.1113(d).)
[2] Unspecified Exhibits refer to exhibits to the Declaration of Esther W. Kim.

Dr. Weiler, the radiologist who prepared a report of a P.E.G.-o-gram study to confirm PEG tube placement after Mr. Garcia began to deteriorate. (Exh. 2, at p. 97:22-98:14 [RT 3/28/22].) Motions for summary judgment on behalf of South Coast Global Medical Center, Dr. Soni, and Dr. Menon were unopposed and granted. Dr. Singh was dismissed with prejudice. The only defendant at trial was Dr. Quraishi.

B. Trial Began Against Dr. Quraishi On March 15, 2022, And The Jury Returned A Verdict In His Favor On April 19, 2022

Trial was originally set to commence on May 4, 2020, but was continued multiple times to June 14, 2021, September 20, 2021, and March 14, 2022. (Declaration of Robert L. McKenna III ("McKenna Decl.") ¶ 2.)

1. Defense Counsel Disclosed A Potential Scheduling Conflict If The Trial Were Did Not Conclude By April 4, 2022

At the trial call on March 14, 2022, the Court said that trial is conducted on Mondays through Wednesdays. Defense counsel repeatedly told the Court and counsel that he was required to attend the second phase of a contractual arbitration beginning on April 4, 2022, and concluding on April 12, 2022. (McKenna Decl. ¶ 3; Kim Decl. ¶ 4.) Defense counsel requested a continuance for a month until after the arbitration was concluded on April 12. (*Ibid*.) Plaintiffs' counsel did not object to starting trial on March 14, 2022. (McKenna Decl. ¶ 4; Kim Decl. ¶ 5.) Indeed, plaintiffs' counsel appeared to agree with starting trial and he said it would likely be concluded before defense counsel was scheduled to begin arbitration. (*Ibid*.) On March 14, 2022, Plaintiffs' counsel represented they planned to rest on March 23, 2022. (McKenna Decl. ¶ 5; Kim Decl. ¶ 6 and Exh. 3 [Ledezma email 3/14/22].) He wrote, "Assuming all goes as planned, I should be able to rest at the end the [*sic*] 23rd." (McKenna Decl. ¶ 6; Kim Decl. ¶ 7.) On that representation, defense counsel scheduled their witnesses in effort to conclude trial on March 30, 2022. (*Ibid*.)

2. The Trial Court Denied Plaintiffs' Motion in Limine No. 8 To "Preclude Empty Chair Arguments"

Motions in limine were heard and decided on March 15, 2022. Plaintiffs' Motion in Limine no. 8 sought to preclude "Empty Chair Arguments" as to "dismissed defendants." (Plaintiffs' Exh. L [Plaintiffs' Motion in Limine No. 8].)

Dr. Quraishi opposed the motion, arguing that he would not introduce evidence of other defendants' negligence but that he may not be precluded from introducing evidence of the care provided by other defendants, which is foundational to explaining decedent's treatment. (Exh. 1 at p. 3:3-5.) [Defendant's Opposition to Plaintiffs' Motion in Limine No. 8.] "Defendant will not be putting forth an 'empty chair defense' and will not be asserting any *negligence* against prior defendants, nor will defendant be offering any evidence to this effect." (*Id.* at p. 4:13-15, emphasis added.)

The Court explained that, "I don't think I can grant the motion and say what you can't argue. You can argue what you want if there's evidence to support it." (Plaintiffs' Exh. E, at pp. 27-28 [RT 3/15/22].) This Court further explained it would revisit the issue if necessary during trial—a point which counsel acknowledged. (*Ibid*.)

3. A Jury Was Selected And The Parties Had Full And Fair Opportunity To Conduct *Voir Dire*

Jury selection took place on March 16, 2022, and March 21, 2022. Counsel had full and fair opportunity to conduct *voir dire*, without time limits, and three counsel participating, along with jury consultant. (McKenna Decl. ¶ 7; Kim Decl. ¶ 9.)

4. The Court Adjourned Trial Due To Defense Counsel's Pre-Disclosed Arbitration And A Juror's Scheduling Conflict

Plaintiffs' case lasted through March 30, 2022. Dr. Quraishi began his case, then trial was recessed from April 4 to April 18, 2022, to allow for defense counsel to attend the previously mentioned arbitration, though April 12, 2022. Trial would have restarted on April 13, 2022, but for a Juror's scheduling conflict. (McKenna Decl. ¶ 8.) Juror

number 6 (Mr. Sauer) was going to be out of town, so trial resumed, instead, on April 18, 2022. (McKenna Decl. ¶ 8.)

5. After Trial Resumed, The Defense Completed Its Case And The Jury Was Instructed

The defense completed its case on April 18, 2022. (Minute Order, April 18, 2022.) It presented, *inter alia*, testimony by Dr. Ellis and by Dr. Quraishi. The jurors asked three questions regarding the testimony of the former, and one question as to the latter. (Minute Order, April 18, pp. 2, 3.) The court granted defendant' nonsuit as to economic damages regarding plaintiff Katherine Vanessa Garcia and as to the estate of Enrique Garcia Sanchez. (Minute Order, April 18, 2022, p. 1.)

The jury was instructed the next day, including instructions not to base their decision on bias or sympathy and that what the attorneys say during trial is not evidence. (Minute Order, Apr. 19, 2022, p. 2; Exhs. 5-6 [CACI 5000, 5002].)

6. The Parties Presented Closing Arguments After Which The Jury Deliberated And Returned A Verdict That Dr. Quraishi Was Not Negligent

The parties presented closing argument. (Minute Order, 4/19/22.) Plaintiffs' counsel summarized the testimony of each witness and the evidence in support of their case. (Exh. 7 [RT 4/19/22, Plaintiffs' closing argument].) The jury deliberated and returned a verdict that afternoon. (Minute Order, 4/19/22.) The jury found by unanimous verdict that Dr. Quraishi was not negligent. (Special Verdict Form, 4/19/22.)

C. Dr. Quraishi Did Not Contend Or Present Evidence That Anyone Breached The Standard Of Care; However, Plaintiffs' Counsel Presented Evidence Of Breach By Dr. Weiler, The Radiologist

Plaintiffs' expert Lokesh Arora, M.D., opined at trial that decedent would still be alive but for the conduct of Dr. Weiler. (Exh. 2, at p. 105:10-26 [RT 3/28/22].) On December 15, 2017, Dr. Quraishi ordered a PEG-o-gram to confirm positioning of the PEG tube. (Exh. 8 at p. 37:14-23 [RT 3/30/22 (A)].) The PEG-o-gram was performed,

and the study was interpreted by Dr. Weiler, who prepared a report of the study findings. (Exh. 2 at p. 98:2-10, 98:20-99:4; [RT 3/28/22].) Dr. Weiler's report stated that the PEG tube was inside the stomach. (Exh. 2 at p. 98:2-19, 103:24-104:5 [RT 3/28/22].)

In fact, the PEG tube was dislodged on December 15, 2017. (Exh. 2, at p. 54:11-55:2 [RT 3/28/22].) Dr. Weiler did not convey this fact in his report of the PEG-o-gram, nor did he order a CT scan to further investigate the PEG-o-gram's findings. (Exh. 2, at p. 103:24-104:19 [RT 3/28/22].) If a CT had been ordered at this time, it would have found the PEG tube outside the stomach and afforded surgeons an opportunity to address the issue. (Exh. 2, p. 105:10-18 [RT 3/28/22.) In other words, plaintiff's expert, Dr. Arora, testified that if Dr. Weiler made the recommendation to conduct a CT study, "Mr. Garcia would be with us today in all likelihood." (*Ibid.*)

Second, the doctors who cared for Mr. Garcia, including Dr. Quraishi, relied upon Dr. Weiler's report regarding the PEG tube placement. (Exh. 2, at p. 104:2-5 [RT 3/28/22].) That reliance met the standard of care. (Exh. 2. 103:24-104:5 [RT 3/28/22]; Exh. 8, at p. 44:13 – 45:1 [RT 3/30/22].)

Third, to the extent that plaintiffs claim that defense counsel presented inadmissible evidence regarding an "empty chair" or made improper closing argument, plaintiffs' counsel failed to object. (McKenna Decl. ¶¶ 9-10; Kim Decl. ¶ 11 and Exh. 7 [RT 4/19/22, defendant's closing argument].)

D. Several Weeks After The Verdict Was Returned, Defense Counsel Made Private Remarks Inside His Firm Which Were, Unbeknownst To Him, Recorded And Posted On Social Media

On May 13, 2022, after the conclusion of the trial and the jury's verdict, counsel for defendant, Robert McKenna was participating in a closed-door interoffice meeting where both his Los Angeles office and his Huntington Beach office were connected via zoom. (McKenna Decl. ¶ 11.) One of the purposes of the meeting was to summarize recent cases that had been brought to completion and celebrate certain victories over the past two years of the pandemic. (*Id.* at ¶ 11.) During that meeting, Mr. McKenna briefly described a case without naming any parties, counsel, or venue. (*Id.* at ¶ 12.) The

description was hyperbolic and meant to recognize the work other lawyers put into the case. It was not intended to be, nor was it, an objective, comprehensive or even accurate recitation of this case. Mr. McKenna was unaware he was being taped or that it would be put on social media. (*Id.* at ¶ 12.)

When it came to Mr. McKenna's attention that a video had been taken, posted and reposted by others, he recorded an apology video and posted it to his firm's Instagram account and LinkedIn profile. (McKenna Decl. ¶ 13.) Specifically, without identifying any parties, lawyers, or venue, he apologized for any appearance of impropriety that was caused by the unauthorized taping and dissemination of the remarks. (*Id.* at ¶ 13.)

DISCUSSION

"The right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute." (*Wall Street Network, Ltd. v. New York Times Co*. (2008) 164 Cal.App.4th 1171, 1193.) The court may not grant a motion for new trial unless one of the foregoing causes "materially affect[s] the substantial rights of" the moving party. (Code Civ. Proc., § 657.)

"A trial court serves as a 'gatekeeper' on a motion for new trial. It opens the gate only rarely, a testament to the fact that the vast majority of trials are fairly conducted. In these cases, motions for new trial are routinely made, routinely denied, and are routinely affirmed on appeal." (*Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1068-1069.)

Here, plaintiffs seek a new trial on the grounds of (1) irregularity in the proceedings, (2) accident or surprise, and (3) newly discovered evidence. None of these grounds warrants a new trial. The motion should be denied.

I. A NEW TRIAL IS NOT WARRANTED BASED ON ANY ALLEGED "IRREGULARITY IN THE PROCEEDINGS"

Plaintiffs argue that they are entitled to a new trial because of three irregularities in the proceedings – a "lengthy break," attorney misconduct, and a juror's lack of candor in *voir dire*. None warrants a new trial.

A. The Midtrial Adjournment Is Not A Basis For A New Trial

A midtrial adjournment is not an irregularity. Plaintiffs have not presented any authority to establish otherwise. Additionally, plaintiffs' argument was forfeited because they agreed to proceed to trial beginning on March 15, 2022, after defendant's counsel had disclosed his arbitration commitment. (McKenna Decl. ¶ 3; Kim Decl. ¶ 5.) In fact, plaintiffs' counsel believed the trial could be concluded before then. (McKenna Decl. ¶ 4; Kim Decl. ¶ 6 and Exh. 3 thereto.) Had plaintiffs' counsel believed the adjournment would preclude a fair trial, they could and should have moved for a mistrial, but they did not.

Furthermore, plaintiffs have not established that the adjournment precluded a fair and impartial trial. Plaintiff's argument is not supported by any evidence, but only by the assertion that the "jurors went into deliberations with only the immediate recollection of testimony on one side." (Motion, p. 11:9-10.) This assertion does not establish prejudice. Having an "immediate recollection" of defendant's testimony does not mean the jury did not have recollection of the plaintiff's testimony. (Indeed, in nearly every civil trial, the defense evidence is more immediate than the plaintiff's evidence.) And plaintiffs' claim that the break resulted in "presumably, resentment by the other jurors," is unsupported by any evidence.

But even assuming the recency of evidence were a legitimate issue, that was resolved by closing argument. Plaintiffs' counsel spent forty minutes presenting a detailed recitation of plaintiffs' witnesses' testimony and other evidence in their closing argument. (Exh. 7, at pp. 30-56 [RT 4/19/22].)

The jury remained engaged upon the resumption of the trial, having asked three questions to Dr. Ellis, and one question to Dr. Quraishi. (Minute Order, April 18, 2022, pp. 2-3.) Two of the questions to Dr. Ellis were asked by Juror No. 9, Mr. Dow. (*Id.* at p. 2; see also Juror Polling Sheet, at No. 9.)

Finally, plaintiffs only evidence—counsel's declarations regarding what Mr. Dow told them—is unavailing. (Motion, p. 4, citing Babaee Decl. ¶ 4 and Robles Dec. ¶ 3.)

That evidence is inadmissible.[3] It is hearsay. (Evid. Code, § 1200, subd. (b).) What is more, even if not hearsay, it would still be made inadmissible by Evidence Code section 1150, which precludes evidence of jurors' mental processes. (Evid. Code, § 1150, subd. (a).) In any event, plaintiffs' proffered LinkedIn statement ostensibly by Mr. Dow, states: "There are many cases where there may be negligence or Doctors not meeting the standard of care. I did not think this was one of those." (Exh. Q to Robles Decl.)

B. Purported Attorney Misconduct Does Not Warrant A New Trial

1. Plaintiffs Waived Or Forfeited Any Claim Of Attorney Misconduct

In the first instance, plaintiffs' claim of attorney misconduct is waived because they did not object on the record and request that the jury be admonished. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411-1412.) This action does not present the type of an extreme case that plaintiffs may be excused from both objecting and from seeking an admonishment. (*Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610, citations omitted.)

Here, plaintiffs waived a claim of misconduct by failing to object to any instance of purported attorney misconduct that they now assert. (McKenna Decl. ¶ 10; Kim Decl. ¶ 11 and Exh. 7 [RT 4/19/22, defendant's closing argument].)

Plaintiffs' assertion that they should be excused from having objected is unavailing. None of plaintiffs' three case citations on this argument, in fact, include a pinpoint cite to any portion of the opinions that assist plaintiffs. (Motion, p. 15:7-9.) In fact, the opinions are unavailing. *Hoffman v. Brandt* (1966) 65 Cal.2d 549) does not excuse failure to object to attorney misconduct. In fact, in that case it was undisputed that plaintiffs objected to the subject argument by counsel. (*Id*. at 553.) *Simmons v. Southern Pac. Transp. Co.* (1976) 62 Cal.App.3d 341, says that even in the absence of an objection and request for admonition, where there are "flagrant and repeated instances of misconduct" an appellate court cannot refuse to recognize the misconduct. Here, the

[3] Defendant has filed separate evidentiary objections.

purported misconduct was certainly not "flagrant and repeated." (*Id.* at 355.) And there the defense counsel had objected on many occasions. (*Ibid.*) Indeed, plaintiffs have not suggested any reason why they could not have raised an objection. Finally, *Love v. Wolf* (1964) 226 Cal.App.2d 378, is likewise inapposite. There, the objecting party had objected and requested admonition of the jury several times, but the requests were disregarded by the trial court. (*Id.* at 392.)

Here, as in *Horn v. Atchison, supra,* the alleged misconduct is not "of such a character that it could not have been obviated by timely objections and instructions." (*Horn v. Atchison, supra,* 61 Cal.2d at 611.) Accordingly, plaintiffs' assertions of attorney misconduct were waived.

2. There Was No Attorney Misconduct

a. Plaintiffs' Assertion Of Misconduct Regarding An "Empty Chair" Defense Is Unfounded

Plaintiffs' claim of misconduct regarding an "empty chair" defense is unfounded. Of course, the subject motion in limine – Plaintiffs' Motion in Limine no. 8 to preclude "evidence as to the negligence of dismissed defendant" – was denied. (Plaintiffs' Exh. L, at p. 1:25-28 [Pltfs' Motion in Limine No. 8]); Minute Order, April; 15, 2022, p. 2.) What plaintiff places at issues is defense counsel's statement that he would not present evidence that anyone was negligent. Defendant's counsel did not engage in misconduct.

First, defendant's counsel did not present evidence that anyone was negligence or acted below the standard of care. Plaintiffs do not identify evidence of someone's negligence that defendant proffered.

Second, plaintiff points only to two statements by counsel in closing argument (Motion, p. 12:21-23, citing Exh. F at p. 10 & Exh. K, at p. 61) but neither are misconduct. They are the statements that: "The question you need to answer is whether this doctor is responsible, and there's no other doctors in this courtroom, is this doctor responsible for that man's death" and that "This is the only person they brought into this courtroom to make this accusation against." Neither statement is evidence of a

negligence, nor a statement that a person was negligent.

Finally, plaintiffs gain no traction from their argument that a video statement made by defense counsel that was posted on social media reflects that defendant presented evidence of a third-party's negligence. Plain and simple, defense counsel did not present evidence of a third-party's negligence. The video is not relevant to this argument.

What is more, to the extent that defense counsel suggested that the treating radiologist was the cause of decedent's death, such suggestion is based on the opinion of *plaintiffs'* expert, Dr. Aurora. He opined at trial that decedent would still be alive but for the conduct of Dr. Weiler. (Exh. 2, at p. 105:10-26 [RT 3/28/22].)

More importantly, any argument relating to Dr. Weiler pertained to the issue of causation, not breach of the standard of care. To defeat the element of causation in a medical malpractice action, a defendant need only demonstrate that an injury was caused by something other than his negligence, but not that such cause was itself negligence or fell below the standard of care. (*Leal v. Mansour* (2013) 221 Cal.App.4th 638, 646 [a defendant is not precluded from presenting "relevant evidence related to a causative factor for which there is no culpable party"].)

b. There Was No Misconduct In Defendant's Closing Argument

Counsel may vigorously argue their case based upon reasonable inferences from the evidence and are not limited to "Chesterfieldian politeness." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.) Here, defense counsel's closing argument did not approach the bounds of impropriety regarding any of plaintiffs' three points.

As to Dr. Kuncir, defense counsel's remarks about his national service were in response to plaintiffs' counsel's statement that Dr. Kuncir had been "banished." (Exh. 7, at p. 52 [RT 4/19/22].) Plaintiffs' counsel argued: "And we all saw Dr. Kuncir; Right? I'm sure we were all happy he was banished to Nebraska. Right?" Defense counsel argued Dr. Kuncir had left the state because of his national service. (*Id.* at p. 59.)

As to plaintiffs' counsel's argument that defense counsel villainized plaintiffs and their counsel, defense counsel's arguments were aggressive advocacy and not improper.

So too was defense counsel's closing argument regarding the county coroner and her report. In fact, defense counsel's remarks about the coroner and her report were based on her testimony that she wished there were a side area on the death certificate for her commentary. (Exh. 4, pp. 54-55 [RT 3/29/22].)

3. Even If The Challenged Conduct By Defense Counsel Were An Irregularity, Plaintiffs Have Not Established Prejudice

Plaintiffs' have not established that the challenged conduct was prejudicial, a prerequisite to a new trial order. (*Martinez v. State of California* (2015) 238 Cal.App.4th 559, 568-670.) The factors bearing on whether an alleged irregularity in the proceedings was prejudicial weigh heavily against a finding of prejudice. They are: (1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances. (*Id*. at 568.)

Here, the alleged misconduct was minor. The challenged statements by counsel were a minor portion of the trial. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802-803 [challenged portion of closing argument was "a mere fraction of counsel's overall closing argument and a minuscule part of the entire 10-week trial"].) The general atmosphere, including the judge's control of the trial, do not indicate that there was prejudice; and the entire record indicates that there was no likelihood of actual prejudice upon on the jury; particularly because the verdict was unanimous and returned rapidly.

In fact, there is no reason to overcome the presumption that the jury disregarded its instruction to decide the case based only on the evidence and that attorney's arguments are not evidence. As noted above, the jury was instructed with CACI Nos. 5000 and 5002. Additionally, in response to objections raised by the defense to plaintiffs' closing argument, the trial court reiterated the instruction that argument by counsel is not evidence. (Exh. 7, at pp. 30, 47 [RT 4/19/22].) The jury is presumed to have followed

these instructions. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598.) Plaintiffs have not proffered any fact or argument to overcome that presumption.

C. Purported "Lack Of Candor" By A Juror In *Voir Dire* Does Not Warrant A New Trial

Plaintiffs have not presented evidence of any lack of candor. The evidence they present – a printout of an ostensible "LinkedIn" page – is hearsay. (Evid. Code, § 1200, subd. (b).)

According to plaintiff, Juror 57 concealed the fact that he had prior work experience as an "insurance agent" in response to questions posed by the Court during *voir dire*. The questions cited by plaintiffs in support of the Motion would not have "prompted [Juror 57] to …to reveal his insurance experience" that he may (or may not) have obtained as an "agent/financial planner/owner" at Farmers Insurance from January 2006-November 2007 according to his purported LinkedIn profile discovered by plaintiff after trial. (*See*, Motion at 1:26-2:3, 2:14-16, and Ex. M to Plfs' Motion.)

Plaintiffs do not identify any question posed during *voir dire* that would have required Juror 57 to disclose that he was an insurance agent for Farmers Insurance (or a financial planner or agency owner) for a period of less than two years more than a decade ago. At most, plaintiff cites the court's question as to whether "anything in your life experience that would prevent you from being fair to both sides." (Motion, p. 2:3-4.) Furthermore, the juror's experience involves sales, not claims, let alone litigation.

The court did not place a time limit on *voir dire* and plaintiffs' three counsel all participated in *voir dire*, with the assistance of their jury consultant. If plaintiffs had wanted to ask the venir panel about experience with insurance, they could have done so.

Furthermore, there is no evidence Dr. Quraishi would have been held liable even if Juror Number 57 had been stricken from the panel. In civil cases, because "three-fourths of a jury may render a verdict" under the California Constitution, one tainted juror will not necessarily have the impact of undermining the verdict. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 322-23.) In those cases where only one juror has been

"impermissibly influenced" by bias or otherwise, the verdict need not be overturned. (*Ibid*.) Here the jury was unanimous, the deliberations were short, and there is no evidence (only plaintiffs' speculation/conjecture) that Juror 57 influenced the other jurors' decision. Further, Juror 57 is presumed to have followed the Court's instruction to only decide the case based upon the evidence introduced. (*Rufo v. Simpson, supra*, 86 Cal.App.4th at 598.) Plaintiffs have not proffered any fact or argument to overcome that presumption.

II. A NEW TRIAL IS NOT WARRANTED BY PURPORTED "NEWLY DISCOVERED EVIDENCE"

"The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demonstrates that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that discovery of testimony when it is too late to introduce it is so suspicions that courts require the very strictest showing of diligence." (*People v. King* (1951) 104 Cal.App.2d 298, 309; *Arnold v. Skaggs* (1868) 35 Cal. 684, 688; *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 138.) Code of Civil Procedure section 657(4) limits this basis to "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (Code Civ. Proc., § 657(4).)

Plaintiffs must prove "(1) that the evidence is newly discovered; (2) that reasonable diligence has been exercised in its discovery and production; and (3) that the evidence is material to the movant's case." (*Horowitz v. Nobe, supra*, 79 Cal.App.3d at 137.) The burden of establishing these elements falls on the moving party. (*Doe v. United Airlines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) Here plaintiffs fail to satisfy the strictest of showings as to each element.

A. The Two Subject Videos Are Not Material Nor Is Their Content "Newly Discovered"

The evidence is not material. "The newly discovered evidence must be material in the sense that it is likely to produce a different result. It must be specific, and if it is not, a new trial cannot be granted." (*Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656, 667.) Here, it is not material.

First, attorney statements are not evidence. And the statements are not probative of any question of fact at issue in the case. (Evid. Code, § 210.)

Second, plaintiff argues that the evidence pertains to "bad faith" of defense counsel. But that was not at issue in the trial. Nor do the videos establish "bad faith" conduct. What defense counsel thought about the case is not the proper subject for pre-trial discovery. To the extent plaintiffs are arguing evidence of the cause of death is newly discovered, there was ample opportunity for plaintiff to take that discovery.

Even if the video evidence were material, it was not "newly discovered." Evidence is not newly discovered merely if it "was not" discovered with reasonable diligence. The evidence cannot be considered new if, with reasonable diligence, "it might have been known." (*Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 512.) "The motion for new trial will be denied where the evidence might have been produced by the exercise of reasonable diligence, or where the moving party has not shown due diligence in discovering and producing it, or where no reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced." (*Mitchell v. Preston* (1950) 101 Cal.App.2d 205, 207-208, emphasis added, citations omitted.) In fact, "A motion for new trial will be denied where the evidence might have been produced by the exercise of reasonable diligence, or where the moving party has not shown due diligence in discovering and producing it, or where no reason is shown why the evidence might not, with reasonable diligence, have been discovered and produced." (*Pierce v. Nash* (1954) 126 Cal.App.2d 606, 620.)

Evidence of Dr. Weiler's conduct as the cause of decedent's death – whether or not negligent – could have been discovered before trial by the exercise of due diligence.

B. Defendants' Cost Memo Is Not Newly Discovered Evidence Warranting A New Trial

Defendants' cost memo is not newly discovered evidence warranting a new trial. Dr. Melany billed for two days of trial testimony because she had to attend two days of trial because of the length of the proceedings on 3/29/22. (Kim Decl. ¶¶ 14-15 and Exh. 9 [3/22/2022 email from defense counsel to Dr. Melany].) Nor does it matter that her billing was not up to date at trial—she so testified to that fact. The only thing the evidence establishes is that she billed for necessary work/document review. Nothing about this supports plaintiffs' motion for new trial.

III. "ACCIDENT OR SURPRISE" DOES NOT WARRANT A NEW TRIAL

Accident or surprise does not warrant a new trial. Plaintiffs' argument merely recapitulates their argument on "newly discovered" evidence. The motion fails on this ground for the same reasons it fails on the ground of "newly discovered" evidence.

IV. THE GROUNDS ON WHICH PLAINTIFFS' MOTION IS BASED DO NOT AFFECT THE NONSUITS GRANTED

The grounds on which plaintiffs' motion is based do not affect the nonsuits granted. First, plaintiffs' motion does not challenge the nonsuits. Second, the nonsuits were granted based on the absence of evidence, but plaintiffs' motion does not assert exclusion of any evidence that would compel a different result on the nonsuit motions.

CONCLUSION

For the foregoing reasons, the motion for new trial should be denied.

DATED: July 13, 2022 COLE PEDROZA LLP

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ESSAM R. QURAISHI, M.D.

PROOF OF SERVICE

I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2295 Huntington Drive, San Marino, California 91108.

On the date stated below, I served in the manner indicated below, the foregoing document described as: DEFENDANT ESSAM R. QURAISHI, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

Jorge Ledezma (SBN 283775) Jose R. Robles (SBN 331922) Shireen Babaee (SBN 337094) LEDEZMA ROBLES & BABAEE, LLP 1851 East First Street, Suite 610 Santa Ana, CA 92705 Tel: (657) 210-2050 Fax: (657) 234-2661 filings@socaltrialattorneys.com jorge@socaltrialattorneys.com jose@socaltrialattorneys.com shireen@socaltrialattorneys.com	*Attorneys for Plaintiffs* JOHANNA GARCIA, KATHERINE VANESSA GARCIA, and THE ESTATE OF ENRIQUE GARCIA SANCHEZ Via Electronic Notification (One Legal)

ELECTRONIC NOTIFICATION (One Legal) – My electronic service address is flindsey@colepedroza.com. On the date stated below, I effected electronic service of the foregoing document to each person at the corresponding electronic service address identified on the attached service list, by submitting an electronic version of the document to One Legal, LLC, through the user interface at www.onelegal.com for electronic service by notification.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 13, 2022.

Freddi Lindsey

Freddi Lindsey